

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT JACKSON

JUNE 1995 SESSION

FILED
September 13, 1995
Cecil Crowson, Jr.
Appellate Court Clerk

EUGENE BROWN,)
)
 Appellant)
)
 V.)
)
 STATE OF TENNESSEE,)
 AND FRED RANEY, WARDEN,)
)
 Appellee)

NO. 02C01-9502-CC-00054
LAUDERDALE COUNTY
HON. JOSEPH H. WALKER,
JUDGE
(Post-Conviction Relief -
Burglary - 2 Counts)

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OPINION FILED: _____

REVERSED AND REMANDED

William M. Barker, Judge

OPINION

This is an appeal as of right by the pro se appellant, Eugene Brown, from the judgment of the Lauderdale County Circuit Court's denial of his petition for post-conviction relief. The appellant contends that the trial court improperly dismissed his petition without the appointment of counsel and an evidentiary hearing to determine the issues raised in the petition. We agree with the appellant and reverse the judgment of the trial court and remand to that court with directions that the court appoint counsel to assist the appellant in amending his petition for post-conviction relief. Further, we direct the trial court to determine whether, after receiving the amended petition, a hearing on the merits of the petition is required pursuant to Tennessee Code Annotated, section 40-30-109 (a) (1990 Repl.).

The record in this case is sparse, but it appears as if the appellant entered guilty pleas to two counts of burglary in the Circuit Court of Lauderdale County on April 29, 1991. The appellant's post-conviction relief petition was originally a request for habeas corpus relief.¹ The trial court properly considered the petition as one for post-conviction relief not habeas corpus because the petition did not allege that the convictions were void or that he was being held despite the expiration of his sentence. The petition appears to claim that the appellant was denied the effective assistance of counsel prior to and during the entry of his guilty pleas and that his guilty pleas were not knowingly and voluntarily entered.

In addition, it appears that the appellant is seeking post-conviction relief based on an allegation of prosecutorial misconduct and the imposition of consecutive sentencing. Neither of these two grounds would ordinarily entitle the appellant to post-conviction relief. See State v. Miller, 668 S.W.2d 281, 286 (Tenn. 1984) (improper cross examination not error of the kind that may be presented by a post-conviction relief proceeding), and State v. Wooten, 477 S.W.2d 767 (Tenn. Crim. App. 1971) (absent claim that sentence rendered conviction void or voidable, post-conviction relief

¹ The petition was filed on February 27, 1992.

not available for alleged sentencing errors); Tenn. Code Ann. § 40-30-105 (1990 Repl.).

However, we hold that the trial court improperly dismissed the petition without the appointment of counsel. In Swanson v. State, 749 S.W.2d 731, 734 (Tenn. 1988), our supreme court held that when a colorable claim for post-conviction relief is presented in an inartfully drafted petition, the dismissal of a petition without the appointment of counsel is rarely proper. See also Mayes v. State, 671 S.W.2d 857 (Tenn. Crim. App. 1984). Even a cursory review of the appellant's petition for post-conviction relief reveals that it is not competently drafted.

Because the petition alleged ineffective assistance of counsel it was incumbent upon the trial judge to appoint counsel to assist the appellant in drafting a competent petition so that the court could judge the petition in accordance with the standard set forth in the Tennessee Post-Conviction Procedures Act. The Act "contemplates an evidentiary hearing except in those cases wherein a competently drafted petition and all pleadings, files and records of the case, conclusively show that the petitioner is entitled to no relief." Baxter v. Rose, 523 S.W.2d 930, 939 (Tenn. 1975) (construing former Post Conviction Procedures Act, codified at T.C.A. §40-3801); see also Skinner v. State, 4 Tenn. Crim. App. 447, 472 S.W.2d 903 (1971).

Accordingly, the judgment of the trial court is reversed and the case is remanded to the trial court for the appointment of counsel and, if necessary, the holding of an evidentiary hearing.

William M. Barker, Judge

Concur by:

Paul G. Summers, Judge

Mary Beth Leibowitz, Special Judge